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Nos. 82-818 & 82-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION, ET AL.,
Respondents.

LOCAL 408, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD AND BILDISCO AND BILDISCO, DEBTOR-IN-POSSESSION,
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On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 99 national and international unions with a total membership of approximately 14,000,000 working men and women, hereby moves for leave to file the accompanying brief *amicus curiae* in support of the position of the petitioners in the instant cases. The workers represented

by AFL-CIO unions have a strong interest in the preservation of their wages and working conditions when their employer is in bankruptcy. The decision below severely undermines that interest.

In the attached brief, we make two basic points. First, that when the characteristics of a debtor-in-possession under the bankruptcy laws are properly understood, it becomes clear that debtor-in-possession is an alter ego of the bankrupt employer and as such subject to § 8(d)(1)-(4) of the National Labor Relations Act, as amended, which prohibits the termination or modification of the agreements except in compliance with the procedures established therein. Second, that because § 8(d) establishes public obligations (whereas § 301 of the Labor Management Relations Act protects the private interests of the parties in enforcing their agreement), it would be inconsistent with established bankruptcy principles to excuse the debtor-in-possession from obedience to § 8(d).

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted,

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO is set forth in that motion.

SUMMARY OF ARGUMENT

In the court of appeals' view, "[t]his case places the statutory policies underlying Chapter 11 [the Bankruptcy Code] in tension with our national labor policy as expressed in the National Labor Relations Act." 682 F.2d 72, at 77-78. We disagree. The "tension" perceived by the court below is of its own creation. For nothing in the Bankruptcy Code correctly understood relieves a debtor-in-possession of the obligations stated in § 8(d) of the NLRA or of the obligations stated in other similar public laws.

In part I of our argument we show the error in the "new entity" theory which originated in *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698, 704 (C.A. 2) (*"Kevin Steel"*) and was adopted by the court of appeals—*viz*, the theory that the debtor-in-possession is, for purposes of the labor law, a "successor" of the bankrupt employer and therefore free under § 8(d) to disavow the bankrupt's collective agreement. 682 F.2d at 83 citing *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272, 284. An alter ego is bound by § 8(d)'s requirements in the same manner as the signatory employer. See *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 259, n.5. And a comparison of the characteristics of the employer prior to filing for bankruptcy with those of the debtor-in-possession thereafter, makes clear that under the NLRB's well-established standards, the latter is the alter ego of the former not a successor. Accordingly, the court below erred in reversing the Board's holding that the debtor-in-possession in this case is an alter ego subject to § 8(d)'s requirements in full.

In Part II of our argument we show that it would be inconsistent with established bankruptcy law principles to permit a debtor-in-possession to terminate or modify an agreement without compliance with the procedures in § 8(d)(1)-(4) of the NLRA, as amended. The key to

analysis is the proposition that § 8(d) was not enacted to further the interest of the parties to an agreement in its enforcement, as does the common law of contracts. Rather, § 8(d) is directed to accomplish a *public* objective—

> The purpose of the proscription of unilateral mid-term modifications and terminations in § 8(d) [is] not * * * simply to assure adherence to contract terms. * * *
>
> The structure and language of § 8(d) point to a more specialized purpose than merely promoting general contract compliance. The conditions for a modification or termination set out in paragraphs (1) through (4) plainly are designed to regulate modifications and terminations so as to facilitate agreement in place of economic warfare. [*Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 187.]

And this public purpose is accomplished through the unfair labor practice procedures of a *public* agency, the NLRB. Vindication of the private interest in the enforcement of collective agreements in their entirety is "left to the usual processes of the law and not to the National Labor Relations Board." *Id.*, quoting H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess., at 42. Section 365 of the Bankruptcy Code alters the common law rights and obligations of parties to contracts, analogous to the rights and obligations recognized in § 301. But neither § 365 nor any other provision of the Code excuses the debtor-in-possession or trustee in bankruptcy from the public obligation described in § 8(d). For it is a well-established principle of bankruptcy law 'that federal statutes regulating business in the public interest are equally applicable when the business is run by trustees or receivers." *Cullen v. Bowles*, 148 F.2d 621, 623 (C.A. 2).

ARGUMENT

The court of appeals held that § 1107 of the Bankruptcy Code, 11 U.S.C. § 1107, which provides that a debtor-in-possession has the rights and responsibilities of a trustee in bankruptcy, and § 365 of that Code, 11 U.S.C. § 365, which governs the assumption and rejection of executory contracts, lead to the conclusion that a debtor-in-possession that desires to change the wages and working conditions stated in a collective agreement between the bankrupt company and an exclusive bargaining representative of the company's employees may do so without observing the requirements of § 8(d)(1)-(4) of the National Labor Relations Act as amended by the Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.* It is our position that § 1107 does not make the debtor in possession a "new entity" legally distinct from the bankrupt company for the purposes of the labor laws, that under basic labor law principles the debtor in possession is therefore obliged to conform to § 8(d)'s requirements, and that § 365 does not empower the bankruptcy courts to override the public rights and obligations stated in § 8(d), a provision enacted by Congress to further the public purpose of minimizing industrial strife.

I. A DEBTOR-IN-POSSESSION IS, FOR THE PURPOSES OF § 8(d) OF THE NLRA, AS AMENDED, AN ALTER EGO OF THE BANKRUPT EMPLOYER.

The court of appeals determined that a debtor-in-possession is not governed by § 8(d) of the NLRA, as amended, insofar as that provision forbids an employer to terminate or modify a collective agreement during its term without satisfying the conditions set forth in § 8(d)(1)-(4).

The court below reached that result on the theory that the debtor-in-possession is a "new entity . . . created with its own rights and duties, subject to the supervision of the bankruptcy court." 682 F.2d 72,

quoting from *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698, 704 (C.A. 2) (hereafter "*Kevin Steel*"). On that premise, the court of appeals declared that the "debtor-in-possession's position is analogous to that of a successor employer: It may be required to recognize and bargain with the union, but it is not a party to its predecessor's collective bargaining agreement unless it assumes that agreement. *NLRB v. Burns Security Services, Inc.*, 406 U.S. 272, 284." 682 F.2d at 83. That court therefore rejected the NLRB's determination that the debtor-in-possession is an "alter ego" of the bankrupt employer who is a party to the collective agreement. As an alter ego, the debtor-in-possession would be subject to § 8(d)'s requirements in full on the authority of *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249 (hereafter "*Howard Johnson*"), which carefully distinguished between the obligations of a successor and those of an alter ego:

> It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co.* v. *NLRB*, 315 U.S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor. See *Southport Petroleum Co.* v. *NLRB*, *supra*; *NLRB* v. *Herman Bros. Pet Supply*, 325 F.2d 68 (CA6 1963); *NLRB* v. *Ozark Hardwood Co.*, 282 F.2d 1 (CA8 1960); *NLRB* v. *Lewis*, 246 F.2d 886 (CA9 1957). [417 U.S. at 259, n.5.] [1]

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[1] *Howard Johnson*, of course, arose under § 301 of the LMRA. But the principal holding of that case is that the limitations on a successor's obligations to honor a predecessor's contract under

We submit that it was the court of appeals, rather than the Board, which erred in characterizing the status of the debtor-in-possession, and therefore in determining the latter's § 8(d) obligations. The "new entity" theory on which the opinion below and the *Kevin Steel* opinion proceed was carefully analyzed, and shown to be fallacious in *In Re Brada Miller Freight System*, —— F.2d ——, 112 LRRM 3410 (C.A. 11, April 11, 1983) (hereafter "*Brada Miller*"). Judge Tuttle wrote there:

> While we recognize that the debtor-in-possession may constitute a "new juridical entity" for some purposes, we find the debtor-in-possession indistinguishable from the pre-bankruptcy corporation as far as concerns their respective obligations under the collective bargaining agreement and the labor laws that regulate the formation, existence, and termination of such agreements.
>
> The most obvious problem with the new entity theory is the statutory requirement that a debtor-in-possession purportedly not a party to contracts executed by the pre-bankruptcy corporation, apply to the bankruptcy court for approval of its rejection of a collective bargaining agreement. If Congress had intended that the debtor-in-possession be in no way bound by the contracts of the pre-bankruptcy entity, the statutory scheme could simply prescribe that the filing of the bankruptcy petition constitutes a breach of all executory contracts to which the debtor is a party and grant the trustee/debtor-in-possession discretionary power merely to assume, not reject, these contracts.
>
> Conversely, if a bankruptcy court refuses to allow a debtor-in-possession to reject a collective bargaining agreement, the debtor-in-possession is bound retroactively to the agreement from the time of the

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§ 8(d) as declared in *Burns* are applicable in suits to enforce a contract brought under § 301. Because the Court derived its § 301 ruling from § 8(d) precedent, that limitation is one common to both of these provisions.

filing of the petition; yet, the proponents of the new entity concept have failed to articulate a legal theory which justifies binding a "non-party" to the agreement. In these circumstances, the new entity theory collides head on with the fact that a debtor-in-possession may be held accountable for breaches of the collective bargaining agreement committed in the time between the filing of the petition and the motion for rejection.

In short, the viability of the new entity theory is contingent on the bankruptcy court's granting of the debtor-in-possession's motion to reject the collective bargaining agreement. Its fragility is all too apparent in contrary situations where the debtor-in-possession is compelled to comply with the terms of an existing collective bargaining agreement. [112 LRRM at 3414-3415, footnotes omitted.] [2]

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[2] The *Brada Miller* Court noted too:

> Perhaps recognizing some of the inherent faults of the new entity theory, the Second Circuit, its principal proponent, has attempted to restrict the theory's application since its promulgation in Kevin Steel and REA Express. In Matter of Unishops, Inc., 543 F.2d 1017, 1018-9 (2d Cir. 1976), the court wrote:
>
> We again caution that the language of [Kevin Steel] stating that "[a] debtor-in-possession under Chapter XI . . . is not the same entity as the pre-bankruptcy company" should not be extended as a generalization in cases other than those involving labor collective bargaining agreements where the claim is that Section 8(d) of the [NLRA] . . . precludes disaffirmance of the labor agreement in a Chapter XI proceeding without taking the steps required under Section 8(a) of the Labor Act; or under the Railway Labor Act . . ."
>
> However, this constraining language does nothing to cure the problems with the theory; once it is determined that § 365 is applicable to collective bargaining agreements, we see no evidence of a distinction by Congress between collective bargaining agreements and ordinary executory contracts that would support the Second Circuit's efforts to limit the theory's applications. The more the theory is forcibly restricted to a particular legal situation, the more appropriate becomes its character as a "legal fiction."

Whereas the court of appeals charged the NLRB with having a "fundamental misconception of the law" (682 F.2d at 83), the *Brada Miller* analysis demonstrates that the "new entity" theory embraced by the court below is unsound even if viewed entirely from the perspective of bankruptcy law, and is a legal "fiction" (*Brada Miller*, 112 LRRM at 3415) adopted to achieve labor relations objectives benefitting the debtor-in-possession. And when the characteristics of a debtor-in-possession are viewed directly rather than through the distorting mirror of the *Kevin Steel* "new entity" theory, it is readily seen that the debtor-in-possession is, for purposes of § 8(d), an "alter ego" of the bankrupt employer rather than its successor.

The hypothesis that the debtor-in-possession is, by virtue of the Bankruptcy Code, a *different* entity merely poses, but does not answer, the question whether one of the separate entities is the alter ego of the other.[3] To answer that question,

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[3] It is not clear that Congress intended the debtor in possession to be considered an entity different from the "debtor" (bankrupt employer). First, 11 U.S.C. § 1101 defines the debtor-in-possession to mean the "*debtor* except when a person that has qualified under section 322 of this title is serving as trustee in the case." Second, the issue of the debtor-in-possession's status goes principally to how the business is to be managed, not to the ownership of the business or its obligations under law. The House Report on the 1978 Bankruptcy Code states:

> An initial question in a reorganization case is whether the management of the debtor should be left in possession to operate the business, or whether an independent trustee, representing the creditors' and equity security holders' interests, should be appointed to replace the management. If a trustee is appointed, the management is completely ousted, although occasionally a trustee hires former management to handle day-to-day operations. The trustee is put completely in control of the business. If a *trustee is not appointed, then business continues as usual, subject, however, to court supervision over the debtor's actions.* [H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 220].

[Continued]

> the Board looks to the ownership management, business purpose, operation, equipment, customers, and supervision of the two businesses. Where some of these listed indicia are "substantially identical," the Board will find an alter ego status. However, not all of these standards have to be satisfied; centralized control of labor relations or identical corporate ownership is not crucial to the finding of an alter ego. [*Blake Construction Co., Inc.*, 245 NLRB 630, 634 (1979)].

The characteristics of an employing entity before and after filing for bankruptcy and attaining the status of a debtor-in-possession are such that the foregoing criteria for identifying an alter ego are clearly satisfied. Indeed, none of these criteria are changed by virtue of going into bankruptcy; by allowing the employer to continue to operate his business as a debtor-in-possession, rather than under the control of a trustee, the 1978 Bankruptcy Code reinforces the substantial continuity of the enterprise. See n. 3 *supra*. It is significant in this regard that neither the court below nor the *Kevin Steel* court has pointed to any characteristics of the debtor-in-possession that would negate alter ego treatment.

Because of the respondent's failure to file an answer, the Board was not called upon in this case to make a finding that the respondent is the alter ego of his pre-bankruptcy signatory to the agreement. But, the NLRB law in this regard is uniform and longstanding. The Board had previously held a debtor-in-possession in a

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[3] [Continued]

Indeed, the Bankruptcy Code Reports referred to the debtor and the debtor in possession interchangeably:

> During the progress of the case, the business of the debtor continues to operate. The trustee, *or if the debtor remains in possession, the debtor*, does what is necessary to reduce the business' losses, by selling unprofitable divisions, by closing certain plants or stores, by reducing the workforces, or by *rejecting or renegotiating burdensome contracts*. [*Id.* at 221 (emphasis added)].

Chapter 11 proceeding under the 1978 Bankruptcy Code to be an alter ego of the bankrupt employer. *Jersey Juniors, Inc.*, 230 NLRB 329, 331-332 (1977).[4] And the Board has also held both before and after adoption of the 1978 Code that a *trustee* in bankruptcy is an alter ego of the bankrupt employer, barring a major change in the business operations. Compare *Airport Limousine Service, Inc.*, 231 NLRB 932, 934, n.2 (1977); *Cagle's Inc.*, 218 NLRB 603, 604 (1975); and *Marion Simcox, Trustee of Wagner Shipyard and Marine, Inc.* and *Stateside Service, Inc.*, 178 NLRB 516, 518 (1969) (all holding court-appointed trustees or receivers alter-egos of the original employers) with *Blazer Industries, Inc.*, 236 NLRB 103, 109 (1978) (holding that a receiver was not an alter-ego based on substantial reductions in operations and work force of the original employer initiated by the receiver.) (The status of a trustee for § 8(d) purposes, we note, is not before the court.)

II. BANKRUPTCY COURTS DO NOT HAVE THE AUTHORITY TO RELIEVE DEBTORS-IN-POSSESSION OF THEIR PUBLIC LAW OBLIGATIONS GENERALLY OR OF THEIR § 8(d) OF THE NLRA, AS AMENDED, OBLIGATIONS IN PARTICULAR.

(a) The court of appeals' second major premise was that a collective agreement is a contract in the normal and accepted sense of that term and hence that collective agreements are squarely within the area covered by § 365 of the Bankruptcy Code, the provision governing "executory contracts." But as this Court reminded once again earlier this year:

> a collective-bargaining agreement "is *more than a contract*; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *United Steelworkers of America v. Warrior*

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[4] The Board in *Jersey Juniors* did acknowledge that the Second Circuit in *Kevin Steel* had allowed a bankruptcy court to reject a collective bargaining agreement that would otherwise be binding on the debtor-in-possession. 230 NLRB at 232. However, the ques-

> *& Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). In defining the relationships created by such an agreement, the Court has applied an evolving federal common law grounded in national labor policy. [*Bowen v. United States Postal Service*, —— U.S. ——, 51 L.W. 4051, 4057-4058 (Jan. 11, 1983); emphasis added.]

The essence of that "national labor policy" and the place of the collective agreement in that policy was explained in *Teamsters Union v. Oliver*, 358 U.S. 283, 295:

> The goal of federal labor policy, as expressed in the Wagner and Taft-Hartley Acts, is the promotion of collective bargaining; to encourage the employer and the representative of the employees to establish, through collective negotiation, their own charter for the ordering of industrial relations, and thereby to minimize industrial strife. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45; *Labor Board* v. *American National Ins. Co.*, 343 U.S. 395, 401-402. Within the area in which collective bargaining was required, Congress was not concerned with the substantive terms upon which the parties agreed. Cf. *Terminal Railroad Assn.* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6. The purposes of the Acts are served by bringing the parties together and establishing conditions under which they are to work out their agreement themselves.

Precisely because the "conditions under which [employers and unions] work out their agreements themselves," are the very core of the national labor policy, Congress defined those conditions in § 8(d) of the NLRA, as amended:

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tion whether, following a rejection order, a debtor-in-possession may change wages and working conditions without regard to § 8(d) was not before the Board in *Jersey Juniors*. None of the Board's decisions or dicta suggest that the Bankruptcy Code excuses a debtor from § 8(d)(1)-(4) either before or after a bankruptcy court rejection order. As discussed in this brief, the Code does not provide for any such excuse.

> The section stems from the 1947 revision of the Act, an important theme of which was to stabilize collective-bargaining agreements. The Senate bill, in particular, contained provisions in §§ 8(d) and 301(a) to prohibit unilateral mid-term modifications and terminations and to confer federal jurisdiction over suits for contract violations. See S. 1126, 80th Cong., 1st Sess., §§ 8(d), 301(a). The bill also included provisions to make it an unfair labor practice for an employer or labor organization "to violate the terms of a collective-bargaining agreement." *Id.*, §§ 8(a)(6), 8(b)(5). In conference the Senate's proposed §§ 8(d) and 301(a) were adopted with reatively few changes. See H.R. Conf. Rep. No. 510, *supra*, at 34-35, 65-66. The provisions to make contract violations an unfair labor practice, on the other hand, were rejected with the explanation that "[o]nce parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." *Id.*, at 42. [*Chemical Workers v. Pittsburgh Glass*, 404 U.S. 157, 186 (hereafter "*Pittsburgh Glass*").]

And, the lesson the *Pittsburgh Glass* Court drew from the 1947 amendments is very much in point here:

> *The purpose of the proscription of unilateral mid-term modifications and terminations in § 8(d) cannot be, therefore, simply to assure adherence to contract terms.* As far as unfair-labor-practice remedies are concerned, that goal was to be achieved through other unfair-labor-practice provisions that were rejected in favor of customary judicial procedures. See *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 510-513 (1962).
>
> The structure and language of § 8(d) point to a more specialized purpose than merely promoting general contract compliance. *The conditions for a modification or termination set out in paragraphs (1) through (4) plainly are designed to regulate modifications and terminations so as to facilitate agree-*

> *ment in place of economic warfare.* Thus, the party desiring to make a modification or termination is required to serve a written notice on the other party, offer to meet and confer, notify mediation and conciliation agencies if necessary, and meanwhile maintain contract relations. Accordingly, we think we accurately described the relevant aim of § 8(d) when we said in *Mastro Plastics Corp.* v. *NLRB*, *supra*, at 284, that the provision "seeks to bring about the termination and modification of collective-bargaining agreements without interrupting the flow of commerce or the production of goods . . . ." [404 U.S. at 187.]

Accordingly, *Pittsburgh Glass* "hold[s] that a modification of a collective agreement during its term "is a prohibited unfair labor practice only when it changes a term that is a mandatory subject of bargaining." 404 U.S. at 185. And to underline the differences between the rights and obligations created by § 8(d) and the contract rights and obligations recognized in § 301, *Pittsburgh Glass* emphasizes that the "remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract * * * not in an unfair labor practice proceeding." 404 U.S. at 188.

The NLRA and LMRA, then, establish a dual regime with regard to the negotiation and renegotiation of collective agreements: Section 301 states a set of rules that, like the common law of contracts, is designed "to assure adherence to contract terms." Those rules, again like the law of contracts generally, are enforceable through the "usual processes of the law." Section 8(d), in turn, states a *second* set of rules that have a "more specialized purpose than merely promoting general contract compliance"—*viz.*, "*facilitating agreement in place of economic warfare.*" This second set of rules, like the rest of the regulatory scheme governing the collective bargaining process, is not subject to the "usual processes of the law" but to the system of administration specially designed by Congress for this purpose. That system of

administration and the rights and obligations that are its province are entirely distinct from the private law of contracts:

> The proceeding authorized to be taken by the Board under the National Labor Relations Act is not for the adjudication of private rights. * * * The Board acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce. * * * The immediate object of the proceeding is to prevent unfair labor practices which, as defined by §§ 7, 8 are practices tending to thwart the declared policy of the Act. [*Nat. Licorice Co. v. Labor Board*, 309 U.S. 350, 362-363.]

Thus, even where an unfair labor practice proceeding concerns a collective agreement,

> the right asserted by the Board is *not* one arising upon or derived from the contracts between [the employer] and its employees. The Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices. [*Id.* at 364; emphasis added.]

In sum, the rights and obligations stated in § 8(d) are public rights and obligations that are separate and apart from contract rights and obligations. While § 8(d), *inter alia*, concerns the procedures for modifying those portions of a collective agreement dealing with "wages, hours, terms and conditions of employment," its essence is not to assure adherence to a contract but to state public law rules concerning the times at which there will be economic peace and the times at which the parties may initiate economic warfare and the forms that must be followed in so doing. The requirement that the *status quo* with regard to mandatory bargaining subjects be maintained during certain periods is a means to achieve the overall end of the NLRA—minimizing economic strife.

The status of the obligations stated in § 8(d) during a bankruptcy proceeding is therefore no different than

the status of the obligation to maintain specified labor standards stated in the Fair Labor Standards Act. While Congress in the NLRA has left it to the parties to work out the substance of the applicable wages and working conditions rather than spelling those out in the Act, Congress has, by statute, determined that the wages and other working conditions once set may only be modified in the manner provided for in the NLRA. Once this is recognized, it follows that the authority of the bankruptcy court to relieve a debtor-in-possession of the obligations stated in § 8(d) is no different from the authority of the bankruptcy court to relieve debtors in possession of public law obligations generally—such as those specifying the level of pollutants that may be discharged into the air or the precautions that must be taken in production in the interest of the health and safety of consumers or employees or any other regulation in the public interest imposed on businesses generally. It is to the nature and limits of the bankruptcy courts' authority in that regard that we now turn.

(b) "It has been generally held that federal statutes regulating business in the public interest are equally applicable when the business is run by trustees or receivers." *Cullen* v. *Bowles*, 148 F.2d 621, 623 (C.A. 2).[5]

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[5] In *Cullen* v. *Bowles*, a Chapter X trustee, operating an apartment house, claimed that he was not bound by regulations prescribing maximum rentals under the Emergency Price Control Act. The court rejected this claim. See also *United States* v. *Nixon*, 235 U.S. 237, holding that a railroad receiver was obligated to obey rules and regulations promulgated by the Secretary of Agriculture pursuant to a statute governing shipment by common carriers of cattle from a quarantine district. The pre-Code decisions consistently confirmed that the post-petition operations of a debtor-in-possession or trustee are subject to federal regulatory statutes. *See, e.g., Northern Boneless Meat Corp.*, 9 B.R. 27 (S.D. N.Y.) (Packers and Stockyards Act); *In the Matter of Canarico Quarries*, 466 F. Supp. 1333 (D.P.R.) (state regulations promulgated pursuant to Federal Clean Air Act); *Plourde* v. *Mass. Cities Realty Co.*, 47 F. Supp. 668 (D. Mass.); *Brennan* v. *T&T Trucking Co., Inc.*, 396 F. Supp. 615 (N.D. Okla.) (Fair Labor Standards Act).

The point is so self evident as to scarcely have been controverted. For, as stated in *Donovan* v. *TMC Industries*, 20 B.R. 997 (N.D. Ga.), the Bankruptcy Code does not in terms dictate the opposite view and absent such a Congressional directive any other rule is "unimaginable". There the Secretary of Labor sought injunctive relief against a Chapter 11 debtor-in-possession to enjoin shipment of goods manufactured by the debtor without paying the compensation to its employees required by the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* That court rejected the debtor's contention that the Secretary's action should be stayed:

> The employer has violated a federal statute, it has not merely breached a private agreement and it is the enforcement of the statute, not compliance with a private contract that concerns the Secretary * * *. Whether the law is designed to prohibit fraud, prevent pollution, remove safety hazards, or insure domestic tranquility, the government is not stymied by the debtor's petition in the bankruptcy court * * *. The concern with the health and welfare for the American worker, and the need to reduce labor strife is at the core of the FLSA. To allow a petition in bankruptcy to preempt the remedy available to the Secretary to protect the health and welfare of American workers is unimaginable. [20 B.R. at 1004-1006.]

It has therefore been recognized from the first that a debtor-in-possession, like any other employer, must comply with the NLRA's provisions:

> [I]t will hardly be denied that a debtor in possession is responsible for the unfair labor practices which occur during a reorganization. It's status as an employer is no different, so far as the National Labor Relations Act, 29 U.S.C.A. § 151 *et seq.* is concerned than that of any other employer. Court supervision of corporate reorganization affords the operating possessor no freedom from the statutory duty to its

employees * * *". [*NLRB* v. *Baldwin Locomotive Works*, 128 F.2d 39, 43 (C.A. 3).] [6]

The case law just noted is solidly grounded in the applicable statutory provisions. First, since 1887 the United States Code has provided, to use the current language:

> Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice, but this shall not deprive a litigant of his right to trial by jury. [28 U.S.C. § 959(a).] [7]

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[6] See also *Nathanson* v. *NLRB*, 344 U.S. 25; *In re Shippers Interstate Service, Inc.*, 618 F.2d 9, 13 (C.A. 7); *In re Bel Air Chateau Hospital*, 611 F.2d 1248 (C.A. 9); *NLRB* v. *Coal Creek Coal Co.*, 204 F.2d 579 (C.A. 10); *NLRB* v. *Bachelder*, 120 F.2d 574 (C.A. 7).

[7] Moreover, to alleviate any concern that by reason of the Supremacy Clause federal bankruptcy law would preempt the authority of the states to carry out their regulatory programs 28 U.S.C. § 959(b) and its predecessors preserve state authority:

> The goal of Chapter XI of the Bankruptcy Act is to rehabilitate the debtor. The stay of Rule 11-44(a), aids that rehabilitation and paralyzes suits by creditors or interferences with debtor's property. However, it is our understanding that such rehabilitation must be done within the law. Under no circumstances can there by any rehabilitation outside the law. Debtor must operate its business in full compliance with the laws and regulations of the State. To these effects, Section 959 of Title 28, United States Code, states:
>
> "b. A trustee, receiver or manager appointed in any cause pending in any court of the United States, *including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the state in which such property is situated, in the same manner that the owner or*

As this Court stated "the right given by the statute to sue for the acts and transactions of the receivership is unlimited." *McNulta* v. *Lockridge*, 141 U.S. 327, 332.

The court of appeals pointed to § 365 of the Code as the basis upon which the bankruptcy court may override the public law rules stated in § 8(d). But § 365 deals exclusively with contractual rights and remedies. While § 365 speaks literally of a right of assumption or rejection, it is always true that any party to a contract has the *power* to breach a contract at the pain of being subjected, depending on private law principles, to a judicial order to pay damages or to perform. The essential thrust of § 365 is twofold: first, to modify or replace ordinary private law rules concerning what constitutes a breach and the availability of specific performance; and second, to set out the status in the bankruptcy proceeding of claims arising from a breach.[8]

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possessor thereof would be bound to do if in possession thereof." (Emphasis added).

To authorize debtor to operate its business without obtaining a permit from appellant, under the protection of Rule 11-44(a), violates Section 959, supra. To allow such violation of state law, is not within the jurisdiction of the Bankruptcy Court. *Brennan* v. *T. & T. Trucking, Inc.*, D.C., 396 F.Supp. 615 (1975). Chapter XI Rules were meant to be procedural in nature and were not intended to enlarge or modify substantive rights. Title 28, United States Code, Section 2075; *Mid Jersey National Bank* v. *Fidelity Mortgage Investors*, 3 Cir., 518 F.2d 640. [*In the Matter of Canarico Quarries, Inc. supra*, 466 F. Supp. at 1339.]

[8] Subsection (a) provides the bankruptcy court only with authority to approve the assumption or rejection of private contracts. The remaining subsections deal with relative rights of the parties in cases of assumption or rejection and do so in terms that confirm that the sole subject is contract rights. Subsections (b), (c), (e) and (f) deal with the consequences of default and the rights of the non-debtor party to decline to fulfill the contract or to refuse its assumption or assignment by the trustee. Subsection (d) establishes time frames for the decision to reject. Subsections (g) through (k) provide specific rules governing the liabilities and other consequences resulting from a decision to reject or to assign an executory contract or unexpired lease.

The impact of an order of rejection under § 365 of the Code is *at most* on the remedies available to the non-debtor party under private law. But the court below has taken § 365 one step further by holding that an order of rejection permits the debtor-in-possession thereafter to change wages, hours and working conditions without regard to § 8(d) and that the NLRB is powerless to proceed against the debtor-in-possession with respect to such a statutory violation. This approach is wholly inconsistent with the decisional law and is without any foundation in § 365. Thus, § 365 provides no authorization whatsoever to the bankruptcy court to pretermit the federal government's authority to enforce its public laws and no leave to the trustee or debtor-in-possession to disregard public law obligations.

There are only two other grants of authority to the bankruptcy court that are evenly arguably pertinent.

The first is § 362 of the Bankruptcy Code, 11 U.S.C. § 362, which provides that on the commencement of a bankruptcy case certain proceedings against the debtor are automatically stayed. Although Congress considered the automatic stay to be "one of the fundamental debtor protections provided by the bankruptcy laws * * * giv[ing] the debtor a breathing spell * * * [and] permit[ing] the debtor to attempt a repayment or reorganization plan" (S. Rep. 95-989, 95th Cong. 2nd Sess. 55; H.R. Rep. 95-595, 95th Cong. 1st Sess. 340), §§ 362 (b)(4) & (5) expressly except from the provision's ambit state and federal government actions to "enforce such governmental unit's police or regulatory power".[9]

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[9] *NLRB* v. *Evans Plumbing Co.*, 639 F.2d 291 (C.A. 5) (granting petition for enforcement of NLRB decision ordering the reinstatement of two employees with backpay); *Commodity Futures Trading Commission* v. *Incomes, Inc.*, 649 F.2d 128 (C.A. 2) (requiring CFTC access to debtors' books and records on trading activity); *Securities and Exchange Commission* v. *First Financial Group of Texas*, 645 F.2d 429 (C.A. 5) (S.E.C. appointment of receiver and injunction against offer of securities.) *In re Mansfield Tire and*

The purpose of these exemptions is to preserve governmental authority to "prevent or stop violation of fraud, environmental protection, consumer protection, safety or similar police or regulatory laws, or attempting to fix damages for violation of such a law * * *". S. Rep. 95-989, at 56; H.R. Rep. at 341.[10]

Second, in 1978 Congress also provided the bankruptcy courts the authority to stay certain actions not covered by § 362. Section 105 of the Bankruptcy Code, 11 U.S.C. § 105, grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. In addition, the bankruptcy courts are brought within the scope of the All Writ statute, 28 U.S.C. § 1651 and are given the powers of a court of law, equity and admirality, 28 U.S.C. § 1481.

Both the Senate and House Reports explain the point of these provisions as follows:

> Section 105, of proposed title 11, derived from Bankruptcy Act § 2a(15), grants the power to issue orders necessary or appropriate to carry out the provisions of title 11. The district court and the bankruptcy court as its adjunct have all the traditional injunctive powers of a court of equity, 28 U.S.C. §§ 151 and 164 as proposed in S. 2266, § 201, and 28 U.S.C. § 1334, as proposed in S. 2266, § 216. Stays or injunctions issued under these other sec-

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Rubber Co., 660 F.2d 1108 (C.A. 6) (permitting Ohio Workmen's compensation proceedings to continue); *Donovan* v. *TMC Industries Ltd.* (N.D. Ga. 1982) (Secretary of Labor permitted to enjoin shipment of goods produced in violation of the Fair Labor Standards Act); *U.S.* v. *Energy International Inc.* D.C. 19 B.R. 1020 (S.D. Ohio 1981) (civil penalty assessed by Department of Interior for violations of Surface Mining and Control Act of 1977.)

[10] Notwithstanding the broad grant of jurisdiction to the bankruptcy courts, Congress acted affirmatively to protect the governmental interest in uniform enforcement of public laws by expressly excluding from § 1478 of the Judicial Code, 28 U.S.C. § 1478, the authority to remove to the bankruptcy courts a civil action by a governmental unit to enforce its police and regulatory power.

> tions will not be automatic upon the commencement of the case, but will be granted or issued under the usual rules for the issuance of injunctions. [S. Rep. 95-989, *supra*, at 51; H.R. Rep. 95-595, *supra*, at 342.]

As we have seen, the pre-Code cases consistently held that the bankruptcy courts have no authority to sanction conduct violating public law under the guise of protecting their jurisdiction. And the proposition that a court of equity is empowered to nullify federal statutes in aid of its jurisdiction is manifestly without merit.

(c) Our showing to this point is that nothing in the Bankruptcy Code grants the bankruptcy courts the authority to override public law rights and obligations generally or § 8(d) rights and obligations in particular. Moreover, so far as we have discovered, nothing in the 1978 Code Reports or floor debates shows a contrary congressional intent; indeed, the question presented here is not even noted. The court below, however, suggested that this lack of any affirmative support for its view is overcome by 11 U.S.C. § 1167, which "permits an inference that, with this one exception, Congress did not intend to distinguish collective bargaining agreements from executory contracts in general". 682 F.2d at 78. That provision states

> Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 *et seq.*) except in accordance with Section 6 of such Act (45 U.S.C. 156).

As passed in 1935, and continued until passage of the 1978 Code, the predecessor provision to the foregoing, had provided in part:

> No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the

> Railway Labor Act, as amended June 21, 1934, or as it may be hereafter amended. [§ 77(n) of the Bankruptcy Act 49 Stat. 911 (1935).]

The substance of § 1167, of course, supports our argument that the maintenance of the public law rules designed to further industrial peace are entirely compatible with the aims and purposes of the Bankruptcy Code. It is, intuitively obvious that economic warfare is not conducive to a successful reorganization. Rather, the court of appeals' premise is that but for § 1167 the result opposite to that mandated there would obtain. Nothing in the Bankruptcy Code provides a basis for that premise, as we have shown. Thus, the sounder inference is that § 1167 is designed to remove all controversy on a point of particular importance given the prevalence of railroad reorganizations. The evolution of the provision demonstrates as much.

The failure to include § 77(n) or its equivalent, that is § 1167, in the Bankruptcy Code would properly have been interpreted as a tacit reversal of its prohibition and an authorization to railroad trustees to change wages and working conditions without exhausting the processes of § 6 of the RLA. But the inclusion of § 1167 says nothing with respect to the obligations of a trustee (or debtor-in-possession) under § 8(d) of the NLRA.[11] Be-

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[11] Neither the committee reports nor the floor debates on the Bankruptcy Reform Act of 1978 refer to § 8(d) or the status of labor agreements generally under the NLRA.

No inference is permissible from Congressional reference in 1976 in the Report of the House Judiciary Committee on the Municipal Bankruptcy Act ("MBA"), P.L. 94-260, H.R. Rep. No. 94-686, 94th Cong., 1st Sess., 8-9, to rejection of agreements governing municipal employees under state law, that Congress intended to repeal § 8(d) of the NLRA as to trustees and debtors in possession *sub silentio* in the 1978 Act. The MBA House Report is clear that state law requirements on termination of public employee agreements, which may or may not be comparable to § 8(d), were not to be superseded by § 82 of the MBA permitting rejection of executory contracts. *Id.* The enactment governing bankruptcy of

cause there was no provision regarding § 8(d) in the pre-Code law analogous to § 77(n), the *status quo ante* could preserved without referring in the Code to the trustee's obligations under the NLRA. And, when § 8(d) was adopted in 1947 it had been recognized that a trustee in bankruptcy is subject to the provisions of the NLRA. While the definition of "person" in § 2(1) was amended at that time in another respect (by adding "labor organizations" to the definition), the inclusion of "trustees, trustees in bankruptcy [and] receivers" was retained. There was no indication that Congress intended to except the obligations stated in § 8(d) from the obligations of bankruptcy trustees under the then-existing relationship between the labor and bankruptcy laws.

Yet, if the inference which the court of appeals drew from § 1167 were valid, it would likewise follow that § 8(d) was inapplicable to such trustees at the time of its original enactment in 1947. For, then, just as now, the bankruptcy law contained an express requirement that railroad trustees adhere to the obligations of the RLA before changing wages and working conditions (§ 77(n)) but had no such provision with respect to trustees who were subject to the NLRA.

In short, the difference in sequence of the relevant enactment fatally undermines the court of appeals' inference: when § 77(n) was enacted, § 6 of the RLA was already on the books.[12] It might have been argued, absent § 77(n), that the elaborate railroad reorganization provisions adopted in 1935 rendered § 6 of the RLA in-

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public employers, who are not subject to the NLRA and LMRA, cannot possibly be read to affect the rights and duties of private employers who are subject to those Acts.

[12] Section 77(n) had its antecedent in § 77(o) of the 1933 amendments to the Bankruptcy Act governing railroad reorganization. As is clear from the face of the provision, in 1933 public law already regulated the termination and modification of labor agreements in the railroad industry.

applicable to the reorganization trustees. While such an argument might have been unsuccessful, the body of precedent requiring reorganization trustees to adhere to public laws was not as well developed as in 1947, or at present. In any event, the 1935 Congress, conscious of § 6, which had been adopted in the 1934 revision of the RLA, chose to avert potential litigation over this issue by express provision. Congress did not thereby, or by carrying § 77(n) forward into the Bankruptcy Act, invite the inference that trustees not subject to the RLA would be exempt from a provision, such as § 8(d) of the NLRA, similar to § 6 of the RLA, where no such comparable provision was in existence or so much as a gleam in Senator [then Mr.] Taft's eye.[13]

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[13] It has also been contended that the 1978 Bankruptcy Code silently approved the "new entity" theory (discussed at the outset of this brief) because the Second Circuit had already decided *Kevin Steel*. As a matter of general principle, it is not creditable to suppose that when Congress is engaged in an elaborate reformation of the law in a large area, all appellate decisions dealing with that subject that may have come to its attention and that are not disapproved, are ratified, even if the course of decision was uniform. But the ratification argument fails totally where the law on a given subject is in disarray, for the argument inevitably leads to the question "*What* decisions are being ratified?" As previously shown, *Kevin Steel* and its progeny were far from the only relevant decisions extant as of 1978. The law consisted also of the NLRB decision that a trustee in bankruptcy is the alter ego of the bankrupt employer as well as other decisions holding trustees in bankruptcy subject to the NLRA in accordance with § 2(1) thereof. See pages 9-10, *supra*. Finally, Congress acted in 1978 against the general background of the bankruptcy law which did not excuse bankruptcy trustees from obedience to public law, see pages 15 to 21, *supra*.

CONCLUSION

For the foregoing reasons the decision below should be reversed.

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